

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of

High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link Up	)	WC Docket No. 03-109
	)	
Universal Service Contribution Methodology	)	WC Docket No.06-122
	)	
Numbering Resource Optimization	)	CC Docket No. 99-200
	)	
Implementation of the Local Competition	)	
Provisions in the Telecommunication Act of 1996	)	CC Docket No. 96-98
	)	
Developing a Unified Intercarrier Compensation	)	
Regime	)	CC Docket No. 01-92
	)	
Intercarrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68
	)	
IP-Enabled Services	)	WC Docket No. 04-36

**COMMENTS OF IDT CORPORATION**

IDT Corporation (“IDT”) offers these limited comments on the proposals to reform Universal Service Fund (“USF”) contributions. Specifically, IDT responds to the tentative conclusion that prepaid calling cards are business services based on the manner in which they are distributed to the ultimate end user. For the reasons described below, this conclusion is erroneous and relies heavily on a misstatement of prior positions taken by IDT in unrelated proceedings.

On November 5, 2008 the Commission released its Order on Remand and Report and Order and Further Notice of Proposed Rulemaking (“Order”). Attached to the Order were three

proposed orders that outlined possible changes to the USF contribution methodology. These proposals were contained in three Appendices to the Order: Appendix A, the Chairman's Draft Proposal ("Chairman's Proposal"), Appendix B, the Narrow Universal Service Reform Proposal ("Narrow Proposal") and Appendix C, the Alternative Proposal ("Alternative Proposal").

In the weeks prior to the release of the Order, IDT filed an *ex parte* letter with the Commission providing evidence that prepaid calling cards are used primarily by residential consumers, and in particular lower income consumers.<sup>1</sup> While both the Chairman's Proposal and the Alternative Proposal acknowledge this filing, they attempt to distinguish it and instead classify prepaid calling cards as business services based on a misstatement of IDT's position.<sup>2</sup> They also reverse, without an adequate justification as required by law,<sup>3</sup> the Commission's prior finding that prepaid calling cards are used primarily by low-income consumers and members of the armed services,<sup>4</sup> who are residential, not business, consumers.

The attempt to distinguish the classification of prepaid calling cards solely for USF assessment fails because it compares apples to oranges. Both proposals note that IDT appealed a

---

<sup>1</sup> See Letter from Tamar E. Finn, Counsel to IDT Corporation, to Marlene Dortch, Secretary, FCC, CC Docket No. 96-45, WC Docket 06-122 (filed Oct. 28, 2008). (Providing market research data that calling card purchasers have household incomes less than \$50,000 a year. Specifically, 25% of prepaid calling card consumers responded that they had household income under \$25,000 and another 25% stated it was between \$25,000 and \$50,000. As 39% of responders did not provide household income data, a total of 78% of all respondents who provided this data indicated that they had income of less than \$50,000.)

<sup>2</sup> Order, at A-58, n.329 and C-57, n. 321

<sup>3</sup> "[A]n agency choosing to alter its regulatory course 'must supply a reasoned analysis indicating that its prior policies and standards are being deliberately changed, not casually ignored.'" *Action for Children's Television v. FCC*, 821 F.2d 741, 745 (D.C. Cir. 1987) (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir.1970)).

<sup>4</sup> *Regulation of Prepaid Calling Card Services*, WC Docket 05-68, Declaratory Ruling and Report and Order, FCC 06-79, ¶ 8 (rel. June 30, 2006) (calling card providers "played a vital role in providing telecommunications services to *low-income consumers* and members of the armed services.") (emphasis added).

Universal Service Administrative Company (“USAC”) audit decision. In that appeal, IDT argues that USAC incorrectly classified IDT’s prepaid calling card revenue as end user revenue under current USF rules. In the appeal, IDT argues that sales to its distributor customers do not meet the definition of end user revenues on which USF contributions are based.<sup>5</sup> The Proposals assert that IDT argues it provides business service to business customers; but IDT actually argues that it provides service to wholesale customers, not end users, as those terms are defined under current law. This ongoing dispute between IDT and USAC is irrelevant to the issue of classifying prepaid calling card *services* as residential or business. Indeed, if the classification is based on the identity of the customer purchasing service from the contributor, *all resold telecommunications*, including residential local and long distance, would be classified as business services. Classifying prepaid calling card services, and only such services, based on the identity of the contributor’s customer and not the ultimate end user of the service, is arbitrary and capricious and contrary to law.

Further, even if the Proposals had characterized IDT’s argument accurately, it would be arbitrary and capricious to accept this argument solely for the purpose of subjecting IDT to “business service” contribution obligations, without accepting its other implications. In effect, the Proposals would play a game of “heads, I win; tails, you lose” by treating the wholesale distributor as the “customer” for some purposes and the retail user as the “customer” for others,

---

<sup>5</sup> See Request for Review of Decision of the Universal Service Administrator by IDT Corporation and IDT Telecom, CC Docket No. 96-45 at 12 (filed June 30, 2008) (“Despite the clear and unambiguous language in the governing regulation regarding the term “end user”, the instructions to Form 499-A unlawfully redefine the USF contribution base to include revenue from any customer who is not a contributor to the USF, including someone who is, by common parlance, a reseller or distributor.”) The primary focus of this appeal is to challenge the unenforceable attempts to broaden carriers’ USF obligations beyond what is required under Commission rules through changes in the Form 499-A rather than the notice-and-comment proceeding that is mandated by the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*

depending on which approach maximizes IDT's contribution liability. The Commission must have it one way or the other, not both at the same time.

Although some may argue that the treatment of prepaid calling cards as business services is "interim" and they might be re-classified as residential services in the future, the Narrow Proposal proves otherwise. The Narrow Proposal concludes that all prepaid calling card providers should be treated as *end user customers* of business services.<sup>6</sup> Again, this would reverse prior Commission precedent finding that prepaid calling card providers are "telecommunications carriers."<sup>7</sup> The fact that the Proposals include such diametrically opposed classifications with no justification for the departure from current precedent further confirms that the proposed treatment of prepaid calling cards is arbitrary and capricious.

It is true the vast majority of prepaid calling cards are first sold to distributors, sub-distributors and/or retail outlets before being sold to consumers. But neither the Chairman's Proposal nor the Alternative Proposal disputed the empirical record evidence that prepaid calling cards are *used* by individual consumers, typically of low to moderate means. It is the character of the end user, in this case the person who physically purchases a calling card for use, that should determine whether a service is residential or business. To find otherwise would lead to absurd distortions in the USF system and provides further evidence that the USF contribution methodology should not vary based on classification of the ultimate user of a telecommunications service.

IDT continues to support a number-based contribution methodology to create a more stable USF contribution base. But, in reforming the contribution methodology, the Commission cannot lose sight of the fact that the purpose of USF is to aid, among others, low income

---

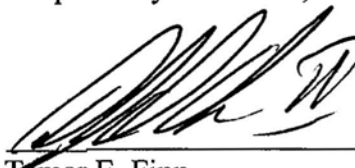
<sup>6</sup> *Order*, at B-35, ¶88.

<sup>7</sup> *Regulation of Prepaid Calling Card Services* at ¶¶ 10, 21.

consumers. The Chairman's Proposal and the Alternate Proposal both fail that basic tenet by treating prepaid calling cards, a service that is demonstrably used by low income consumers, as business services rather than residential. The basis for that conclusion – that prepaid calling cards are first sold to businesses (wholesale distributors) before being sold to the ultimate consumer – is not the real determining factor as to whether the service is residential. The identity of the actual user of the product should control, as in the case of other resold services.

IDT urges the Commission to adopt a comprehensive USF methodology reform based on telephone numbers. To the extent the contribution mechanism varies based on the classification of the service, prepaid calling card revenues should be classified as residential services.

Respectfully submitted,



---

Tamar E. Finn  
Douglas D. Orvis II  
Bingham McCutchen LLP  
2020 K Street, N.W.  
Washington, D.C. 20006  
(202) 373-6000 (Tel)  
(202) 373-6001 (Fax)  
tamar.finn@bingham.com  
douglas.orvis@bingham.com

Dated: November 26, 2008